

Linda Chavez
President



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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 15, 1999

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 98-204
MM Docket No. 96-16

Dear Ms. Salas:

As a comment on the Notice of Proposed Rule Making in the above-referenced docket numbers ("In the Matter of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of EEO Streamlining Proceeding"), I hereby submit the enclosed article on the NPRM, written by me and published in today's *Washington Times*.

Sincerely,

Roger Clegg
Vice President and
General Counsel

Enclosure

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A PROJECT OF THE EQUAL OPPORTUNITY FOUNDATION

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Last April, a panel for the U.S. Court of Appeals for the District of Columbia Circuit ruled that the Federal Communications Commission's regulations were unconstitutional. The court found they "pressure license-holders to engage in race-conscious hiring" — and in fact "oblige stations to grant some degree of preference to minorities in hiring" by, for instance, "pressur[ing] stations to maintain a work force that mirrors the racial breakdown of their metropolitan statistical area."

The commission's petition for the full Court of Appeals to reconsider this decision was rejected in September. (Jesse Jackson and other civil rights leaders had urged the commission to file the petition, which announced its decision to go forward at an NAACP luncheon in May.)

So the FCC went back to the drawing board and has now released its proposed, revised regulations. According to Susan Ness, she and her fellow commissioners "have taken to heart" the court's decision and "are responding fully to [its] concerns." She promises that they "have scrupulously sought to eliminate" any chance that the FCC rules will, quoting the Appeals Court opinion, lead broadcast licensees "to hire with an eye toward meeting [a] numerical target." Not by a long shot.

The new regulations declare that stations "will be expected to make reasonable, good faith efforts to recruit minorities and women" and must "[o]ffer promotions of qualified minorities and women in a nondiscriminatory fashion," and that any union agreements should "assure qualified minority persons or women of equal opportunity for employment." The regulations would also require stations to "[a]void the use of selection techniques or tests that have the effect of discriminating against qualified minority groups or women," and say they must retain "[c]ompilations totaling race, ethnic origin, and gender of all applicants generated by each recruiting source according to vacancy."

Any radio-station owner, and certainly its lawyer, will have no trouble figuring out from these regulations what it is supposed to do. In the first place, while the principle of nondiscrimination is supposed to apply to everyone, it is only the rights of minorities and women that are repeatedly spelled out and emphasized in the new regulations. They are the ones the owner must be sure to recruit, offer promotions to, and protect in union agreements. There is no bar, none, on "selection techniques or tests" that disproportionately screen out non-minorities or men. And it would be a very low-wattage owner indeed who could not figure out what the government is likely to do with the "[c]ompilations totaling race, ethnic origin, and gender."

It gets worse, however. The commission's "Notice of Proposed Rule-making" makes clear the recruitment efforts they have in mind are not race-, ethnic-, or sex-neutral. For instance, the notice says the Court of Appeals' decision "suggests that the commission can develop new outreach rules even if they specifically focus on minorities." (This is not true, by the way. The Court of Appeals said only it did not have to decide whether a preference used only at the recruitment stage was lawful, since the FCC's regulations went "far beyond" that.) The notice says, "Records of the race, ethnic origin and gender of applicants are necessary so that entities can evaluate the productivity of their recruitment sources and change them, if necessary." New forms "may ask questions concerning what, if any, training or internship programs for minorities and/or women [the stations] have implemented." Racially exclusive training and internship programs are explicitly endorsed.

Indeed, the notice acknowledges

FCC out of touch?

that its "race-conscious recruitment programs" are "racial classifications." But it then asserts that there is no constitutional problem because no person is "treated unequally by the government on the basis of race." What nonsense.

Suppose a prime contractor has a list of white-owned companies and a list of black-owned companies, and it decides to ask the former to submit bids on a subcontract but not the latter. Suppose a company decides it has too many Hispanic and not enough white applicants, and so it decides to stop running employment ads on Spanish-language radio stations. Suppose another corporation posts the following notice on the company bulletin board: "Those interested in promotion to a recently created position for vice president of sales should apply immediately. Applications from white males are especially encouraged."

Are any of these companies engaging in discrimination? Of course: They all are. And if the federal government confronted them, would it be mollified if the company defended itself by saying, "It's not discrimination, because when we actually decide whom to hire, promote or contract with, we don't consider race, ethnicity or sex"? Of course not: The feds would, rightly, roll their eyes and snicker, "See you in court." A recruitment policy that is aimed at increasing applications from some groups and not

others — as the FCC would require — is discriminatory.

It is, however, apparently the commission's position that such actions are perfectly acceptable — indeed, mandatory for the stations it regulates — so long, of course,

as the discriminated-against groups are not minorities or women.

One last twist. Suppose that years ago the regulatory agency of a Southern state, after a federal court had struck down its requirement that an industry discriminate against blacks, applauded the statement of business leaders that, notwithstanding the court's decision, they would continue to follow the agency's policy. Isn't there something just a tad unseemly about that? And yet three of the five commissioners at the FCC included exactly such applause — praising the "exemplary broadcasters" who pledged allegiance to the illegal FCC policies — in statements issued with the proposed new regulations. The National Association of Broadcasters, for instance, had said it does not expect stations to alter their policies in light of the court's decision. Worst of all, these supposedly "voluntary" commitments were garnered at the FCC's request.

The new regulations are better than the old ones, no doubt about that. But there is also no doubt the FCC still hasn't gotten the central message that the D.C. Circuit sent: The Commission should not be pushing stations to consider race, ethnicity or sex in their employment practices. The FCC stubbornly insists these factors are of critical importance in determining who should be hired, in large measure because it believes that what a station broadcasts will hinge on the melanin content, ancestral homeland, and sexual organs of the station's employees and owners. That used to be called stereotyping.

Comments on the new FCC rules are due Jan. 19.

Roger Clegg is general counsel of the Center for Equal Opportunity.

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